2016 IL App (1st) 140898-U

FIFTH DIVISION
April 22, 2016

No. 1-14-0898

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 17147
	)	
TIMOTHY SIPP,	)	The Honorable
	)	Mary Colleen Roberts,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 ***Held***: The State failed to present sufficient evidence to prove defendant delivered a controlled substance within 1,000 feet of a building that was a school on the day of the offense; cause remanded for resentencing on defendant's remaining conviction for delivery of 1 gram or more but less than 15 grams of any substance containing heroin, calculation of presentence custody credit, and reassessment of fines, fees, and costs.

¶ 2 Following a bench trial, defendant, Timothy Sipp was found guilty of delivery of 1.2 grams of heroin, and delivery of 1.2 grams of heroin within 1,000 feet of a school. The court merged the offenses and sentenced defendant to 10 years' imprisonment with 83 days of credit for time served. On appeal, defendant contends that the State failed to present sufficient evidence

to prove that he committed the crime within 1,000 feet of a building that was a school on the date of the offense. As defendant does not contest his conviction for delivery of heroin, he requests this court to reduce his conviction and remand this case to the circuit court for resentencing. Alternatively, defendant requests that his mittimus be corrected to reflect the offense of which he was convicted. Defendant also maintains that he is entitled to 23 additional days of sentencing credit and he requests this court to correct the order reflecting fines, fees, and costs.

¶ 3 On August 9, 2011, at 3639 West Division Street in Chicago, Illinois, Chicago police officer Marco DeFranco testified that an investigation into narcotics sales in the area of Division Street and Monticello Avenue began on June 29, 2011. After more than one month, he was assigned to purchase heroin undercover. Officer DeFranco described the location of the offense as the parking lot of a strip mall, with a liquor store, facing Division Street, at the corner of Division and Monticello, and a gyro restaurant to its west. Monticello Avenue ran from north to south and Division Street from east to west. He testified that this area was a known drug market. Officer DeFranco did not mention a school during any of his testimony.

¶ 4 Officer DeFranco further testified that he was familiar with defendant's appearance because of his ongoing investigation, and approached him outside the liquor store at around 12:48 p.m., on August 9, 2011, at 3639 W. Division. He planned to purchase heroin and ascertain whether defendant was a "street level" or higher ranked worker by negotiating for a better price. Introducing himself as "Vinny", Officer DeFranco told defendant that last time he had received twelve or thirteen bags of heroin for $100. Defendant acknowledged having heard of him but that the prior sale had not been with him. They agreed Officer DeFranco would purchase twelve $10 bags of heroin for $100, and discussed a future purchase of 200 ecstasy pills. During their conversation, Officer DeFranco saw Otis Dunn, with whom he was also

familiar as a result of his undercover investigation, on the street nearby. He heard Dunn yell, "no, no, it ain't here[,]" in defendant's direction.

¶ 5 Less than 15 minutes later, a Chevrolet Impala pulled into the lot at the liquor store and Dunn got into the car along with another man. Defendant told Officer DeFranco to be available. Officer DeFranco was near the car, and was about 20 feet from defendant, when he was directed toward the gyro place. Officer DeFranco walked away from the car and back toward defendant who stated, "they told you to go over there." He saw the car exit the lot by the liquor store, drive north on Monticello, west on Division, and then turn back. The car pulled into the lot, Officer DeFranco handed Dunn $100 and received 12 bags of suspected heroin. He returned to his unit where he identified defendant from a photo array and tendered the suspected heroin to Officer Syas, another member of his team.

¶ 6 The State introduced a fifteen-minute video of the events, which was narrated by Officer DeFranco at trial, and a transcript of the audio into evidence. We note that the audio and video exhibits are not part of the record. However, in his brief, defendant's appellate counsel indicated that no issue with respect to these exhibits is raised, and we therefore review this appeal without the audio or video exhibits. Ill. S. Ct. R. 329 (eff. Jan. 1, 2006).

¶ 7 Before the State rested, the parties stipulated that:

> "Patrick M. Finney would testify that he was employed as an investigator with the Cook County State's Attorney's Office on March 26, 2013. That he received an assignment to measure the distance from 3639 West Division Street in Chicago, Illinois to the Cameron Elementary School located at 1236 North Monticello Avenue in Chicago, Illinois. He went to that location and measured

> the distance using a calibrated device used known as a Rolla Tape Model 400. The Rolla Tape Model 400 was calibrated both before and after by using 10 foot pre measured intervals. The distance between 3639 West Division and step of door number 1 of Cameron School was 410 feet."

¶ 8 The parties further stipulated that Officer Verlisha Syas would testify regarding the chain of custody, and that forensic chemist, Martinique Rutherford would testify regarding the process used to confirm that the contents of six of the twelve bags tested positive for heroin and weighed 1.2 grams.

¶ 9 Defendant's motion for a directed finding was denied. Defendant called Officer Syas, who observed the transaction from a nearby van. Officer Syas testified that she did not see the contraband exchange hands or defendant speak with Dunn. On cross-examination, she confirmed that another officer recorded the video from a different vehicle and vantage point.

¶ 10 In announcing defendant's guilt, the court stated in relevant part, "I believe the State proved the within a thousand feet of Cameron Elementary School as well as the underlying offense." The court found defendant guilty of delivery of 1.2 grams of heroin (720 ILCS 570/401(c)(1) (West Supp. 2011)), and delivery of 1.2 grams of heroin within 1,000 feet of real property comprising any school (720 ILCS 570/407(b)(1) (West Supp. 2011)) ("Act"). Defendant's oral motion for a new trial was denied. The court merged the offenses and sentenced defendant, as a Class X offender, to 10 years' imprisonment with three years of supervised release for delivery of 1 gram or more but less than 15 grams of any substance containing heroin within 1,000 feet of a school. The court granted defendant 83 days of credit for time served and

imposed $3,539 in costs, fees, and fines. The court denied defendant's motion to reconsider sentence. This appeal followed.

¶ 11 On appeal, defendant maintains that the State failed to prove beyond a reasonable doubt that the violation occurred within 1,000 feet of a property that was a school *on the date of the offense*. Defendant does not dispute the actual delivery of the contraband.

¶ 12 When presented with a challenge to the sufficiency of the evidence we determine whether all of the evidence, when viewed in a light most favorable to the prosecution, would allow a rational trier of fact to conclude that the essential elements of the crime had been proved beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995). The reviewing court should not substitute its judgment for that of the trier of fact, who is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). However, a reviewing court must set aside a defendant's conviction if a careful review of the evidence reveals that it was so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 13 A conviction for delivery of a controlled substance requires the State to establish that the defendant knew of the controlled substance, that it was within his immediate control, and he intended to deliver it. 720 ILCS 570/401(c)(2) (West Supp. 2011); *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). Delivery of a controlled substance, a Class 1 felony, can be enhanced to a Class X felony if the violation occurs "within 1,000 feet of the real property comprising any school". 720 ILCS 570/407(b)(1) (West Supp. 2011). Although defendant does not challenge his conviction for delivery of the contraband, to sustain the enhancement, the State was required to prove that the violation occurred within 1,000 feet of a property that was a school on the date of

the offense. *Id*.; *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 15; *People v. Ortiz*, 2012 IL App (2d) 101261, ¶11.

¶ 14 In this case, the stipulation is the only evidence the State offered to prove the school's existence. The stipulation shows that, on or after March 26, 2013, investigator Finney measured the distance between the location of the offense and the Cameron Elementary School, which was 410 feet. There are no photographs of the building from which to infer its age or that it existed when the violation occurred. The stipulated testimony did not contain any further information about the building. The officers who worked in the area did not reference the school in their testimony. As the record is devoid of evidence from which to infer that the school existed on August 9, 2011, when the violation occurred, no competing inferences are at issue. *Ortiz*, 2012 IL App (2d) 101261, ¶11. Rather, from the evidence in this record, no rational trier of fact could find beyond a reasonable doubt that defendant committed the offense within 1,000 feet of a property comprising a school. *Boykin*, 2013 IL App (1st) 112696, ¶ 15; See *People v. Cadena*, 2013 IL App (2d) 120285, ¶ 18.

¶ 15 A similar situation was present in *People v. Ortiz* where a witness testified that he measured the distance between the Emmanuel Baptist Church and the location of the drug transaction, and found that it was 705 feet. *Ortiz*, 2012 IL App (2d) 101261, ¶5. He did not testify as to when he conducted the measurement. *Id*. ¶11. There were photographs of the building, but no testimony that they "accurately represented the building as it appeared on the date of the offense." *Id*. The court determined that there was no way of knowing whether Emmanuel Baptist Church existed on the date of the offense and the State failed to prove, beyond a reasonable doubt, that defendant delivered the controlled substance within 1,000 feet of a property comprising the enhancing locality. *Id.* ¶¶11, 13. We find no meaningful difference in

this case where the record is similarly devoid of any evidence connecting the date of the measurement with the date of offense. *Id.* ¶13.

¶ 16 In an attempt to distinguish *Ortiz*, the State relies on *People v. Foster*, 354 Ill. App. 3d 564 (2004), and contends that the trier of fact could infer that the building was a school from the name Cameron Elementary School alone. In *Foster*, the court held that the New Hope Church was a church, by name, and therefore a rational trier of fact could have inferred that it was used primarily for religious purposes, as the Act required. *Foster*, 354 Ill. App. 3d at 568. The issue in this case is not whether Cameron Elementary School is a school. Here, the evidence may have been sufficient to prove that the building referred to as Cameron Elementary School was a school on the day the investigator measured the distance. *Id.* However, this observation tells us nothing about the building's presence 18 months prior. *Ortiz*, 2012 IL App (2d) 101261, ¶11-12. Accordingly, the State's reliance on *Foster* is inapt.

¶ 17 In this case, the presentation of the evidence in the form of a stipulation, rather than contested testimony, does not remedy the stipulation's evidentiary shortcomings. *People v. Gibson*, 287 Ill. App. 3d 878, 880 (1997). Stipulations between parties are given their natural probative effect, and can preclude subsequent attacks on, or contradictions of, the stipulated facts. *Id*. However, where as here, the parties stipulate to a witness's testimony, they do not concede matters not implicated thereby. *People v. Durgan*, 346 Ill. App. 3d 1121, 1132 (2004). Here, taking the stipulated testimony as true, it does not connect the investigation to the offense that occurred more than 18 months earlier. As a result, the natural probative effect of the stipulation falls short of proving an essential element of the enhancement. *People v. Collins*, 351 Ill. App. 3d 175, 180 (2004).

¶ 18 This lack of evidence to support an inference connecting the two dates also renders the State's reliance on *People v. Sims*, 2014 IL App (4th) 130568 misplaced. In *Sims*, an officer's testimony supported the inference that a defendant delivered narcotics within 1,000 feet of a church in Bloomington. *Sims*, 2014 IL App (4th) 130568, ¶ 138. The officer specifically testified that, on the date of the offense, there was an active church within 696 feet of the location of the narcotics transaction. *Id.* ¶¶ 66, 70. He had worked as a police officer in Bloomington for the past 10 years, and the last 5½ as a narcotics officer. *Id.* ¶¶ 51, 66. He testified that he was familiar with the neighborhood where the church was located. *Id.* ¶ 66. The court concluded that a rational trier of fact could have believed the officer's testimony that he was familiar with the neighborhood and that the building was used as a church on the date of the offense. *Id.* at 138.

¶ 19 In this case, the testimony from the officers who worked in the area did not relate to a school. The investigator was silent as to the conditions on the date of the offense, and no evidence was presented from which to infer that the investigator was familiar with the neighborhood on that date. *Boykin*, 2013 IL App (1st) 112696, ¶ 15. Therefore, *Sims* is distinguishable from the present case.

¶ 20 Finally, we note that defendant's statement of the issue characterizes it in terms of whether the school was "operational" on the date of the offence. The case law has applied the requirement that the enhancing locality be "operational" or "active" on the day of the offense to religious institutions that must be used primarily for religious worship. *Foster*, 354 Ill. App. 3d at 568. The Act specifically distinguishes the conditions under which the enhancement applies to violations committed within 1,000 feet of schools, in that "the time of day, time of year, and whether classes were currently in session at the time of the offense is irrelevant." 720 ILCS 570/407(c) (West Supp. 2011). While classes need not be in session, the State was still required

to prove that the school existed on the date of the offense. *Boykin*, 2013 IL App (1st) 112696, ¶ 16. The State failed to make this showing, and as a result, this case does not implicate the issue of whether the Act also requires a school to be "operational" at that time. *Ortiz*, 2012 IL App (2d) 101261, ¶11.

¶ 21 Accordingly, we reverse defendant's conviction for of delivery of 1 gram or more but less than 15 grams of any substance containing heroin within 1,000 feet of a school, which, as a Class X felony, carried a sentencing range of 6 to 30 years. 720 ILCS 570/407(b)(1) (West Supp. 2011). Defendant does not challenge any element of his conviction for delivery of 1 gram or more but less than 15 grams of any substance containing heroin. 720 ILCS 570/401(c)(1) (West Supp. 2011). We therefore affirm that conviction, which, as a Class 1 felony, required a 4 to 15 year sentence. 730 ILCS 5/5-4.5-30(a) (West Supp. 2011).

¶ 22 The court correctly sentenced defendant solely on the greater of the two offenses, and his 10-year sentence was within the sentencing range prescribed to both offenses. *People v. Durdin*, 312 Ill. App. 3d 4, 9-10 (2000). However, the impact of the improper sentencing factor, defendant's conviction for delivery of heroin within 1,000 feet of a school, is unclear, and defendant is therefore entitled to a new sentencing hearing on the less serious conviction. *Id.* at 10.

¶ 23 Defendant next raises several issues related to his mittimus. Because we remand for resentencing without the enhancement, it would be premature to order specific corrections to his mittimus at this time. *People v.Harris*, 2012 IL App (1st) 092251, ¶ 19 (2012). The new mittimus should reflect the sentence and address the additional contentions defendant raised in this appeal. *People v. Mitchell*, 2014 IL App (1st) 120080, ¶ 18 (2014). It should indicate the offense for which he was convicted and include the relevant statutory citation (720 ILCS

570/401(c)(1) (West Supp. 2011)), conform the fine under section 411.2(a) of the Controlled Substances Act (720 ILCS 570/411.2(a)(1) (West Supp. 2013)) to the Class of the offense, and reflect the proper amount of presentence custody credit. *Id.*

¶ 24 For the foregoing reasons, we reverse defendant's conviction for delivery of 1 gram or more but less than 15 grams of any substance containing heroin within 1,000 feet of a school, affirm his conviction for delivery of 1 gram or more but less than 15 grams of any substance containing heroin, and remand for resentencing on that conviction alone.

¶ 25 Reversed in part; affirmed in part; remanded in part.